

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

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**CURTIS WELLS, JR., 99-A-4855,**

**Plaintiff,**

**-v-**

**02-CV-0633S(Sr)**

**C.O. JACOBS, et al.,**

**Defendants.**

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**DECISION AND ORDER**

Plaintiff filed a *pro se* complaint pursuant 42 U.S.C. § 1983 on or about September 8, 2002. In his complaint plaintiff alleges, *inter alia*, that he was assaulted by defendants Jacobs and Hupkowicz at the Attica Correctional Facility (“Attica”), that defendant Cheney failed to protect him from the assault and further, that plaintiff did not receive proper medical treatment for his injuries from defendants Frisby and Higley while at Attica or from defendant Tousignant after he was transferred from Attica to Upstate Correctional Facility. Dkt. #1.

On August 20, 2004, in an incident unrelated to the allegations in plaintiff’s complaint, plaintiff was found unresponsive in his cell. As a result, the Court (United States Magistrate Judge Leslie G. Foschio) was advised by counsel for the defendants that plaintiff was being housed in the Mohawk Correctional Facility’s Regional Medical Unit and would be housed in that facility for the foreseeable future and was unable to participate in the litigation. Dkt. #51. Accordingly, counsel for the defendants requested an Order from Magistrate Judge Foschio staying the entire case

to allow plaintiff sufficient time to recuperate. *Id.* By Order dated April 11, 2005, the case was stayed. Dkt. #52. Thereafter, plaintiff filed a motion seeking the appointment of counsel and to lift the stay of the case. Dkt. #53. By Order dated April 25, 2006, Magistrate Judge Foschio granted plaintiff's motion to lift the stay and motion to appoint counsel and appointed James J. Rooney, Esq. to represent plaintiff.<sup>1</sup> Dkt. #54.

By letter dated April 25, 2008, counsel for the plaintiff advised the Court that during an attempt to take plaintiff's deposition, questions arose concerning plaintiff's ability to communicate both orally and in writing, thus, calling into question, plaintiff's competency to give a deposition. Following a May 27, 2008 status conference with counsel for both parties, the Court issued the following Text Order:

TEXT ORDER: Counsel for the defendants is hereby directed to make arrangements to have the plaintiff examined and evaluated by a physician for purposes of determining whether the plaintiff has sufficient mental acumen to give testimony in a deposition relating to his claims at issue herein. This examination and evaluation shall be completed by July 31, 2008, and a written report by the examining physician of such evaluation shall be provided to the attorneys for the parties herein within 10 days after the completion of said examination and evaluation. SO ORDERED.

Dkt. #80. Plaintiff was evaluated on November 19, 2008 by Norman J. Lesswing, Ph.D. a Clinical and Forensic Psychologist who concluded that "Mr. Wells is not competent to proceed with litigation." The Court has reviewed a copy of Dr. Lesswing's Report and has concluded, with the consent of counsel for the parties, that plaintiff is not able to

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<sup>1</sup> By Text Order dated September 19, 2007, Magistrate Judge Foschio recused himself from the case and the case was referred to the undersigned by United States District Judge William M. Skretny. Dkt. ##66 and 67.

submit to a deposition or otherwise proceed with the litigation and that a guardian ad litem should be appointed for the limited purpose of considering a settlement offer that is expected to be forthcoming from counsel for the defendants.

Accordingly, pursuant to Federal Rule of Civil Procedure 17(c), Kevin M. Hogan, Esq. of Phillips Lytle LLP, 3400 HSBC Center, Buffalo, New York 14203 is hereby appointed to serve as plaintiff's guardian ad litem, *pro bono*, for the limited purpose of settlement negotiations. Enclosed herewith and provided to Kevin M. Hogan, Esq. are copies of the complaint and the Report of Psychological Evaluation prepared by Dr. Lesswing. The guardian ad litem is hereby directed to contact plaintiff's counsel, James J. Rooney, Esq., forthwith so that settlement negotiations may commence immediately.

**SO ORDERED.**

Dated: Buffalo, New York  
August 12, 2009

**s/ H. Kenneth Schroeder, Jr.**  
**H. KENNETH SCHROEDER, JR.**  
**United States Magistrate Judge**